

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ARIZONA
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4 In Re: Bard IVC Filters) MD-15-02641-PHX-DGC
5 Products Liability Litigation)
6) Phoenix, Arizona
7) May 31, 2018
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11 BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 STATUS AND SCHEDULING CONFERENCE
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P R O C E E D I N G S

THE COURT: So let's talk about scheduling.

It seems to me we need to cover the schedule I talked about earlier today, which is things like motions in limine, deposition designations, the final pretrial order. We also need to talk about the jury questionnaire and get dates for that to be sent out. We need to decide what the next bellwether trial is so we know what we're preparing for.

We said in an earlier case management order that we would pick the sixth bellwether plaintiff after the first two trials, so we should talk about whether it's time to do that, because I assume there's some additional discovery on that plaintiff that needs to be done.

I'm thinking that the fifth and sixth trials will occur in the first half of 2019, although we haven't picked dates for it yet.

So those are the things that we need to talk about.

I don't know that we've set a final pretrial conference date for the September trial.

MR. NORTH: I don't think we've set a case either. Which case it would be.

THE COURT: Right. Right. We need to pick a plaintiff.

So the dates we've set are September 10th through the

14:10:28 1 14th, 18th through the 21st, and 24th through the 28th.

2 But I may have overlooked something. I've got to be
3 in DC for a meeting in the month of September for the Judicial
4 Conference of the United States.

14:10:54 5 (The Court and the courtroom deputy confer.)

6 THE COURT: Counsel, we've got those dates set in
7 September. I don't see that I've made accommodation for a
8 meeting I have to be at in DC that always happens in the
9 middle of September, so I need to figure out what that is and
14:12:54 10 we'll just adjust the schedule on one side or the other to
11 accommodate that.

12 But in light of that I think, what we ought to do --
13 I think what we ought to do is set the final pretrial
14 conference for Thursday, August 30th, if that works with
14:13:40 15 everybody. And that would be a couple weeks before the start
16 of trial.

17 And I would say 10:00 a.m. like we did before so that
18 we've got enough time during the day to accomplish it.

19 If we did that, then in terms of the jury
14:14:05 20 questionnaire, following the same type of schedule we've had
21 before, I would propose that you jointly provide me with any
22 changes to the questionnaire in light of whoever the plaintiff
23 is by July 5th.

24 Nancy, could you check and see when the judicial
14:14:30 25 conference meeting is in September. The Judicial Conference

1 of the United States. It's not on the calendar and I've got
2 to take into that account for the trial schedule. Thank you.

3 So if you could get your joint comments to me by
4 July 5th, we would mail out the questionnaire to 200 people
14:14:49 5 again by July 13th, with instructions that it be returned to
6 the Court by August 10th. You could pick up copies of the
7 questionnaire by August 17th. I would provide you with my
8 list of people excused for hardship by August 24th. And then
9 we would go through the same process at the final pretrial
14:15:14 10 conference on August 30th that we had before.

11 Any concerns or questions about that schedule?

12 MR. LOPEZ: No, Your Honor.

13 MR. NORTH: None, Your Honor.

14 THE COURT: Okay.

14:17:12 15 I would then suggest that we have motions in limine
16 due by Friday, July 27th, with responses by Friday,
17 August 10th. Same kind of approach we've taken before.
18 Short, focused motions in limine.

19 That we have the final pretrial order submitted by
14:17:55 20 August 17th. And that we have deposition designations
21 submitted by August 15th. Because I'll have some time, some
22 travel time, when I could work on those in the week after
23 that.

24 MR. LOPEZ: Did you say 15, Your Honor?

14:18:43 25 THE COURT: 15, yeah.

14:18:54 1 Any concerns about those dates?

2 MR. LOPEZ: Not from plaintiffs, Your Honor.

3 MR. NORTH: None, Your Honor.

4 THE COURT: Okay. Do you think we need to have
14:19:06 5 another hearing like we had in April on issues that you may
6 want me to revisit for this third trial? Or should we do that
7 as part of the final pretrial conference? We did it earlier
8 after the Booker trial, I think just to get them on the table.

9 MR. LOPEZ: Well, I think we should, Your Honor.

14:19:28 10 We -- you may not want to hear this today, but we need to
11 revisit this time issue that keeps burdening the plaintiffs
12 more than it does the defense.

13 We heard your mandate from last time. We did our
14 best to stay within that, but I think it's important for the
14:19:42 15 Court to know that we sent home or did not call our regulatory
16 expert, our reporting rates expert, or our SIR guidelines
17 expert in this case because we didn't have time to do it. And
18 those are -- those are primary defenses in the case. And
19 there's just no way we could have called them.

14:20:06 20 And we talked about this once before when we talked
21 about timing of these cases. Because I tried a Recovery
22 case -- Recovery case is a little simpler because your
23 evidence stops at a certain period of time. We were in trial
24 with Judge Jones from like 8:00 in the morning until 6:00 at
14:20:26 25 night and it took us about eight or nine days to get our

14:20:30 1 evidence in just in a Recovery case. And you know Judge
2 Jones, he -- if he felt we were being cumulative or overdoing
3 it, he would have told us.

4 We're doing our best to fit within these confines,
14:20:43 5 but I have to remind the Court that way back when, when we
6 talked about timing these cases, we talked about three weeks
7 and then you had mentioned that that would be mean 12 days
8 because you're only in court -- and then the number of hours
9 that you had set at that time was 66. And so I thought, just
14:21:04 10 in thinking through that, if we got an extra two hours we
11 probably got 35. I always said it takes 35 hours to try these
12 cases. I've always said that. And that's even tough to do.
13 And now we're -- we've basically got a day and a half less to
14 try these cases.

14:21:22 15 When I agreed to -- I wasn't taking into
16 consideration deliberation time for the jury. Technically we
17 have a day and a half left in a 12-day trial that we could
18 have really used on the plaintiff side.

19 We'd like to revisit that. I don't know if you want
14:21:39 20 us to brief it. I don't know if you want us to lay out our
21 rationale and why it is unfair to the plaintiffs who have the
22 burden of proof in this case and to lay out for you the
23 defense -- I mean the defense knows what our case is. I'll
24 lay out in detail what these three experts would say and what
14:21:55 25 additional evidence we can't put in.

14:21:57 1 Then we get to the defense part of the case and we're
2 100 miles an hour trying to cross-examine.

3 And I don't think we're going to get a real feel for
4 the bellwether results unless the plaintiffs have a little bit
14:22:13 5 more time to really put on the evidence that we just don't get
6 to put on in these cases.

7 I promise you there's a lot of stuff on SRI
8 guidelines, on reporting rates, and on this FDA defense that
9 we just don't get -- the jury never sees. They didn't see it
14:22:30 10 last time and didn't see it this time. And if we have the
11 same restriction, they're not going to see it next time.

12 So, again, Your Honor, I'm only saying this because
13 we want to get a real feel for whether or not these bellwether
14 cases are going to tell us something. I think the plaintiffs
14:22:44 15 have to have a better opportunity to present their cases
16 because there's some state court cases coming up where we're
17 not going to have these restrictions and maybe we'll get a
18 read there. Which will be good. I mean, it'll show in a
19 different set of circumstances, maybe even without FDA
14:23:00 20 evidence, what those cases are worth.

21 But if we want to get a real read in the MDL about
22 the liability picture, the damages picture, the defenses, and
23 whether or not if you remand all these cases back to different
24 courts what they're really going to look like, I don't think
14:23:20 25 we're going to under the circumstances that we have right now.

14:23:23 1 I just -- again, I want to be able to articulate this
2 better and lay it out for the Court so the Court more fully
3 understands why we, with this tremendous burden of proof that
4 we have, are trying two-thirds of a case.

14:23:38 5 I know the evidence. I know that I haven't shown you
6 yet what it is that we are not able to put into evidence, but
7 it's a fairly significant amount of expert testimony and
8 evidence and testimony from corporate witnesses.

9 We took five or six corporate witnesses out of this
14:23:56 10 thing that were pretty important to us. We had to make -- you
11 know, we had to make decisions. Then the case-specific part
12 comes in, and that's different for every case.

13 THE COURT: I understand what you've said.

14 MR. LOPEZ: Thank you, Your Honor.

14:24:11 15 THE COURT: Do defendants want to say anything on
16 that point?

17 MR. NORTH: Your Honor, we personally believe that
18 the restrictions are reasonable and viable and we have
19 endeavored to live within them and I think have successfully
14:24:23 20 done so, and I think it imposes a sense of necessary order and
21 limitation to the trial.

22 (The Court and the judicial assistant confer.)

23 MR. LOPEZ: Your Honor, may I add one thing quickly?

24 The defense called a regulatory expert, a reporting
14:25:27 25 rates expert, and an SRI guidelines expert. That's how we had

14:25:31 1 to put that evidence in, through their experts. And we didn't
2 have that opportunity to do it because we just don't have time
3 to do it in our case in chief.

4 THE COURT: I understand what you've said.

14:25:40 5 I will think about this when I set the overall
6 schedule. If I am not inclined to give you additional time,
7 I'll let you brief it so that you can make a full argument.

8 What else, though, do you think we need to address?
9 Do we need to set a hearing where we revisit other issues, or
14:26:00 10 can we do that at the final pretrial conference?

11 MR. LOPEZ: Couple things. Number one, we've agreed
12 on one of the three that should be in the next -- we haven't
13 agreed on the order. Mr.--

14 THE COURT: That's a different question.

14:26:13 15 MR. LOPEZ: Oh. I'm sorry.

16 THE COURT: The question is issues we need to
17 revisit. We set a hearing two weeks after the last trial to
18 do that.

19 MR. LOPEZ: I understand.

14:26:21 20 THE COURT: I won't set one unless we need to do it
21 again.

22 MR. LOPEZ: Just one, then. It's Dr. Kandarpa. He's
23 being deposed in a state court case as part of a state court
24 case. We want to cross-notice it in that case.

14:26:37 25 Again, we can continue to try these cases without

14:26:39 1 what might be the most important witness on a G2 case, from
2 the standpoint at least from the plaintiffs' perspective, or
3 we can arrange so that the prejudice is gone on the next two,
4 three, four, or five bellwether cases to get Dr. Kandarpa's
14:27:00 5 testimony by videotape.

6 THE COURT: Remind me who he is and what the basis
7 was.

8 MR. LOPEZ: Dr. Kandarpa was the medical monitor of
9 the EVEREST trial.

14:27:08 10 THE COURT: But what did I rule on him?

11 MR. LOPEZ: That because he was not revealed in a
12 witness -- in the interrogatories when interrogatories were
13 sent out prior to trial, that he was not revealed as a
14 potential witness.

14:27:20 15 THE COURT: Oh, that's right. Okay. I remember now.
16 So you want to use him in the next trial?

17 MR. LOPEZ: We do.

18 THE COURT: And you say he is being deposed?

19 MR. LOPEZ: I can't remember the date. Mr. Lerner
14:27:31 20 may know.

21 MR. LERNER: He's being deposed in late June.

22 THE COURT: Is that one of the Arizona cases?

23 MR. LERNER: It's for a Florida case.

24 MR. LOPEZ: It's cross-noticed in the state court
14:27:48 25 Arizona case.

14:27:52 1 MR. CLARK: Your Honor, to clarify, this was
2 cross-noticed in the Arizona consolidated cases and in this
3 case. Again, that was one of the things we were going to talk
4 about today. We did not want you to think we were sort of
14:28:04 5 violating your order on discovery cutoff, but out of
6 precaution wanted to make sure that was clear.

7 THE COURT: Okay.

8 I assume the position of the defendants is the same
9 as it's been before?

14:28:17 10 MR. NORTH: Right, Your Honor. Even though they've
11 known about him, questioned witnesses about him two years ago,
12 he was never identified in discovery responses and we've been
13 proceeding, I think both parties and the Court, as if the --
14 well, with the parameters of the evidence set, and if it's
14:28:34 15 going to start shifting on things like this that weren't
16 disclosed, I think we're opening up a Pandora's box because
17 there are other things that could be opened quickly too.

18 THE COURT: All right. Let me think about that as
19 well. I want to look back at my ruling.

14:28:51 20 MR. CLARK: There is a subpart to that. My
21 understanding is the deposition also will relate to there's a
22 foundational issue with respect to some documents that were
23 produced by Bard but were not Bard documents. So part of that
24 deposition, I think, will lay that foundation. So there's
14:29:05 25 sort of two parts. There's a substantive witness issue, but

14:29:07 1 also the foundational aspect of the exhibits. So just for the
2 Court's consideration as you think about it.

3 THE COURT: Okay.

4 Besides those two issues, are there matters that we
14:29:17 5 need to address in terms of revisiting prior rulings?

6 MS. REED ZAIC: Your Honor, we would like the *Cisson*
7 on decision, the FDA decision, revisited on a motion in
8 limine. These last two trials have been based on Georgia law
9 and part of your opinion was based on Georgia law. The next
14:29:32 10 three plaintiffs are not in Georgia and Georgia law wouldn't
11 be applied.

12 THE COURT: That's the argument that I should exclude
13 FDA evidence?

14 MS. REED ZAIC: Yes, Your Honor.

14:29:51 15 THE COURT: It was fully briefed before and I decided
16 it. What I think I'd like to do on that issue is have you
17 file a five-page memorandum building on the previous briefing
18 and explaining why the outcome should be different under a
19 different state's law. Just focusing in on that issue. I
14:30:10 20 don't think we need to re-brief everything we briefed before;
21 we can read that again. And allow the defendants file a
22 five-page response.

23 And that's obviously something that should be decided
24 sooner rather than later because that will change the nature
14:30:24 25 of the trial if I were to grant it.

14:30:27 1 So I think what I'd like to do on that issue is have
2 the plaintiff file the five-page memorandum by June 15th.
3 Which is two weeks from tomorrow. Does that work?

4 MS. REED ZAIC: It does as long as we know which case
14:30:51 5 is next. Which law to argue.

6 THE COURT: We're going to decide that. And then a
7 five-page memo in response from defendants by June 29th. Two
8 weeks after.

9 And what I will do is go back and reread those briefs
14:31:13 10 and the order and take into account the new law and decide
11 whether that changes the outcome of that ruling.

12 All right. I think with those issues identified,
13 I'll indicate in the order that comes out whether I need more
14 briefing on the request for additional time in the Kandarpa
14:31:35 15 issue. I understand those issues pretty well so I don't think
16 we'll need to brief those. I don't think we need a hearing on
17 them.

18 We'll look at the *Cisson* briefing. If we think we
19 need oral argument, we'll just set a phone conference at some
14:31:46 20 point in early July so we can get that decided.

21 All right. Mr. Lopez, you were going to say
22 something about the next bellwether plaintiff.

23 MR. LOPEZ: Yes. Mr. North and with Mr. O'Connor and
24 me have agreed Mulkey should one of the next two. The dispute
14:32:16 25 is whether or not the Kruse case or the Hyde case should be

14:32:20 1 one of those next two.

2 I just conferred with Mr. O'Connor again and we're
3 trying to figure out what the fourth case is going to be, Your
4 Honor. We're fine with the Mulkey case being the next case
14:32:36 5 set so we don't have to worry about coin flip this time or
6 delaying the process any further.

7 THE COURT: Tell me the basics of Mulkey. What
8 filter? What kind of injury?

9 MR. O'CONNOR: I believe it's Eclipse.

14:32:53 10 THE COURT: It's an Eclipse?

11 MR. NORTH: Your Honor, it's an Eclipse. It involves
12 tilt, perforation, and an unsuccessful retrieval attempt.

13 THE COURT: Okay. Is there any objection to that
14 being the September trial?

14:33:13 15 MR. NORTH: No, Your Honor. We believe it should be
16 because it was a joint pick by both sides. It was the only
17 one of the five cases that both sides nominated for the pool.
18 So I think it's entirely appropriate.

19 THE COURT: What state law is that?

14:33:25 20 MS. HELM: Kentucky.

21 THE COURT: Kentucky?

22 MS. HELM: Yes, sir.

23 THE COURT: Is that any clearer than Georgia law?

24 MS. HELM: I'm just going to refrain from saying
14:33:35 25 anything to my brethren in Georgia.

14:33:39 1 THE COURT: I think the assumption has to be yes.

2 MR. O'CONNOR: It is Kentucky.

3 (The Court and the judicial assistant confer.)

4 THE COURT: All right, Counsel, I have just learned
14:35:01 5 the item that I hadn't accounted for in the schedule requires
6 me to be out on September 11th, 12th, and 13th, which is a
7 Tuesday, Wednesday, and Thursday.

8 So what I am thinking is that we should shift the trial a
9 week later so that we start on the -- we go the 18th through
14:35:40 10 the 21st, the 25th through the 28th, and August 2nd through --
11 I'm sorry, October 2nd through October 5th. And I'll adjust
12 that a bit more if I agree we should add time on the overall
13 trial as the plaintiff has requested.

14 We're going to be up against the problem we often are,
14:36:08 15 which is I won't have any flexibility on the back end because
16 coming -- starting the week of October 8th I've got to be back
17 in DC again. So we'll kind of be locked into those days. But
18 at least we can get the three-week trial in then.

19 If we weren't to do that, I have no time in October, so
14:36:25 20 we'd really lose the opportunity to try the case in September.

21 MR. LOPEZ: Good idea. I think --

22 THE COURT: Just a second.

23 (The Court and the courtroom deputy confer.)

24 THE COURT: Go ahead, Mr. Lopez.

14:36:43 25 MR. LOPEZ: Maybe jury selection on the 14th, Your

14:36:45 1 Honor?

2 THE COURT: Yeah, that's a possibility. Problem is I
3 fly back from DC the evening of the 13th on the last flight
4 out. If for any reason that flight were to be canceled, which
14:37:14 5 has been known to happen flying out of National, I wouldn't be
6 here on the 14th. I'm just reluctant to call in all of the
7 jurors on a day when there's a risk I won't be here. I think
8 I'd be here, but --

9 MR. LOPEZ: I understand.

14:37:28 10 THE COURT: -- that's the problem.

11 But, as Traci points out, another thing we can do is
12 we could -- no, that's not going to work either. I've got to
13 be out on the 17th.

14 (The Court and the courtroom deputy confer.)

14:38:08 15 THE COURT: Traci has pointed out we might have some
16 flexibility to be in trial on Monday the 24th of September
17 and/or Monday, October 1st, which will give us an additional
18 time to work within those days. So I'll look at all of that
19 in connection with the request for additional time that's been
14:38:28 20 made.

21 But that means that the trial start date is now going to
22 be October 18th. I can't start it on the 17th.

23 THE COURTROOM DEPUTY: September.

24 THE COURT: September. I've got another meeting on
14:38:46 25 the 17th.

1 I'll tie that schedule down in the order that comes
2 out after this.

3 I think when Nancy walked in we were talking about
4 bellwether trials. We agreed Mulkey is September.

5 What are your thoughts on how we pick the October
6 plaintiff? Are you going to discuss that? Are you going to
7 leave it up to me?

8 MR. LOPEZ: I think Mr. North and I agreed we would
9 submit to you kind of our positions why it should be, two
10 pages, and just let Your Honor decide which one based on each
11 party's rationale and why it should be the fourth.

12 THE COURT: All right.

13 MR. LOPEZ: We want Hyde, they want Kruse. That's
14 the bottom line.

15 THE COURT: Pardon?

16 MR. LOPEZ: We wanted the Hyde case, they want the
17 Kruse case.

18 THE COURT: Do you really mean two pages?

19 MR. LOPEZ: Yes, sir.

20 THE COURT: Okay. Two pages per side. By June 15th.
21 And that raises the question that I mentioned a
22 minute ago, which is selecting a sixth bellwether plaintiff.

23 The two questions in my mind: Do we need to do that?
24 And, if so, how soon do we need to do that? Recognizing that
25 the trial of that case would be about a year from now under

14:40:22 1 the schedule we're currently on.

2 What are your thoughts?

3 MR. LOPEZ: Well, there's not a Recovery case in the
4 mix right now. Although I will tell the Court there are a
14:40:34 5 number of Recovery cases. I think three of the four in Judge
6 Brodman's Court scheduled for August are Recovery cases.
7 Maybe we'll get a bellwether read from that. Of course, that
8 is a non-punitive state.

9 But there are also some Recovery cases that, as you
14:40:54 10 know, Your Honor, we have these early remands that were --
11 some had already gone through MSJs and we just need to
12 schedule MILs. And maybe the consideration would be instead
13 of moving it out, moving it out, moving it out and having this
14 thing delayed until we get more bellwether kind of data is to
14:41:14 15 let us propose to you some of these cases that we're so close
16 to trial that maybe they could be remanded and tried with a
17 different judge while we're dealing with the five that we're
18 dealing with now.

19 MR. NORTH: Your Honor, I believe, I'd have to look
14:41:32 20 at the data again, but the last time I looked just two, three
21 weeks ago, only about nine percent of the cases in this MDL
22 are Recovery filter.

23 But more important, when we launched on this
24 bellwether selection process a year and a half ago or
14:41:45 25 whenever, we had a pool of cases that we together went and

14:41:49 1 took a baseline of basic depositions in all of those cases,
2 and then we selected the five bellwethers we presently have
3 from that group.

4 If we go and pick another case, we're going to be
14:42:02 5 starting from scratch. It's been a while since I've looked at
6 those cases, but we have a pool of cases where both parties
7 have already taken four, five depositions in each case. And I
8 think that intent was always to draw the next bellwether from
9 that group since we're already pretty far advanced there, and
14:42:22 10 I think that's what we should plan to do.

11 I don't think there's an immediate rush since the
12 trial would be a year from now. I think maybe if we selected
13 that bellwether by the time of the next trial, that would
14 still give us nine months to do what little additional work is
14:42:37 15 necessary, assuming it comes from that pool where we've
16 already done basic discovery.

17 THE COURT: In the order that I entered at Docket
18 5770, I noted that besides the five that had been chosen,
19 there were four other candidates that the parties had briefed.
14:43:02 20 And they were -- actually there were five other candidates.
21 There was Nelson, Peterson -- actually there was more than
22 that. Nelson, Peterson, Tinlin, King, Mixson, and DeWitt.

23 I said in the order the Court will select the sixth
24 bellwether case from Discovery Group 1 after two bellwether
14:43:35 25 trials have been completed.

1 I think what I'd like to do is this: I'm going to
2 expand your two-page memos to four pages and I'm going to ask
3 to you address two subjects. One is who should be the fourth
4 bellwether, and the other should be who should be the sixth
5 bellwether. And if you can agree, great. If not, give me
6 your thoughts on that subject in light of where we are in the
7 case.

8 Just make a note here.

9 MR. LOPEZ: 15?

10 THE COURT: Yeah, that's June 15th.

11 And we will address the Mulkey motion for summary
12 judgment that has been briefed in the next month or two.

13 What else do we need to cover from your side?

14 MR. LOPEZ: That's all I can think of right now, Your
15 Honor.

16 MR. NORTH: Your Honor, the only other thing I would
17 mention, and I don't know if this is the appropriate time, but
18 some -- at some point as this MDL evolves and prior to any
19 remands on a significant level, there are a couple of issues
20 that I think ought to be addressed, one in particular, that
21 would help winnow down the cases.

22 We believe we have a valid summary judgment motion as
23 to a large -- well, about 100 cases because they all involve
24 the Simon Nitinol filter and there has never been any expert
25 reports disclosed here alleging any defects with the Simon

14:45:34 1 Nitinol filter. And, to the contrary, the plaintiffs'
2 evidence has always centered upon the Simon Nitinol filter as
3 a viable design alternative. And that's something -- it's not
4 a front-burner issue, but something down the line we'd like
14:45:49 5 the Court to entertain the possibility of us trying to begin
6 to narrow down the pool of these cases with a motion such as
7 that.

8 MR. LOPEZ: I don't want to speak out of turn, Your
9 Honor, but I don't think Simon Nitinol filter is even part of
14:46:03 10 this MDL. We've got no discovery on Simon Nitinol filter.
11 I'd have to look at what the JPML order says, but I don't
12 think we petitioned -- I think this was supposed to be
13 retrievable --

14 THE COURT: Is it true, though, we have in this MDL
14:46:18 15 100 Simon Nitinol cases?

16 MR. LOPEZ: We might. They probably keep track of
17 that better than I do. But I can find out.

18 MR. NORTH: 94 is the last count I had, Your Honor.

19 THE COURT: What do we do with those, Mr. Lopez?

14:46:30 20 MR. LOPEZ: We have to talk to the folks that are
21 involved in that, in those cases, which we have not done.

22 We made it pretty clear in the beginning we weren't
23 going to be doing discovery on the Simon Nitinol filter. So
24 if they are depending on this committee to have done discovery
14:46:48 25 in those cases, we haven't. I mean as far as liability. Of

14:46:51 1 course, as you know, we wanted discovery on it as part of the
2 retrievable cases, but we've not focused any of our generic
3 discovery on the Simon Nitinol filter.

4 MR. NORTH: I will have to check, Your Honor, but I
14:47:05 5 do believe a number of the cases have been filed by members of
6 the plaintiffs' steering committee.

7 MR. LOPEZ: Okay. I don't think it's part of the
8 master complaint, to be honest. I don't think it is. I'm
9 told it's not.

14:47:22 10 THE COURT: Well, assuming that we have those cases
11 in the MDL, we need to do something with them.

12 MR. LOPEZ: Mr. O'Connor and I will deal with that.
13 Why don't you let us see -- we'll find out who they are, we'll
14 either put together a conference call or send out an
14:47:39 15 appropriate notice to those folks and then let us report back
16 to you within the next ten days, two weeks.

17 THE COURT: I hate to do it, but I'm going to make
18 these six-page memos, and that's going to be our third issue.
19 Unless you can reach agreement. If you all disagree on how --
14:48:07 20 if the plaintiffs' view is they're not part of the MDL, they
21 should be sent back to their districts, and the defendants
22 disagree, no, they're part of the MDL and should be resolved
23 here, I'm going to have to decide that issue. If you're in
24 agreement what needs to happen, that's great. But let's
14:48:23 25 include that just so we're dealing with that issue as well.

14:48:26 1 What else do we need to address?

2 MR. NORTH: Nothing further from the defense, Your
3 Honor.

4 MR. LOPEZ: Nothing further from the plaintiffs, Your
14:48:33 5 Honor.

6 THE COURT: Let me ask you all a question, then, that
7 I haven't raised before, and that's the overall question of
8 settlement talks.

9 We've got the bellwether trial schedule in place. I
14:48:47 10 intend to push through to a conclusion, and my intent would be
11 shortly after that to remand everything else. My assumption
12 being the results in six bellwether trials will give the
13 parties a very good idea how these cases play in front of
14 juries. If you can't settle it with that, then the MDL has
14:49:09 15 served its purpose and they ought to go home.

16 What I haven't been of a mind to do is finish the
17 bellwether trials and then go into a sort of limbo while time
18 drags on and the parties do some sort of minuet on settlement.
19 But I don't know whether your thought is that the time to talk
14:49:31 20 settlement is after bellwether six or whether that process
21 starts beforehand or whether you're thinking we're not going
22 to talk settlement, in which event I'll just remand after the
23 sixth bellwether verdict.

24 I'm interested in your thoughts. I'm not going to
14:49:49 25 lean on you to settle. I don't think that's a proper role for

14:49:52 1 a judge. But I need to figure out the overall schedule and
2 decide how it should be put in place to accommodate what you
3 all are thinking is the necessary settlement discussions while
4 we are in the MDL. If any. So I invite your thoughts on
14:50:09 5 that.

6 MR. LOPEZ: Well, first of all, I don't think you'll
7 ever hear a plaintiffs lawyer say he's not interested in
8 discussing settlement of any case.

9 THE COURT: I haven't yet.

14:50:21 10 MR. LOPEZ: We didn't start this MDL just so we can
11 try 3,000 cases.

12 The reason we have this MDL, Your Honor, I know
13 you've heard me say this before, is I had a few cases and a
14 few of us had a number of cases that were about five percent
14:50:37 15 of what this MDL reveals right now and we were invited to have
16 a global settlement discussion with Bard three times,
17 including after what I thought was a successful trial with
18 Judge Jones in a Recovery case. And the interest -- the
19 disinterest in that did not come from us. So we were
14:51:00 20 prepared.

21 In fact, we prepared our cases three years ago with
22 much detail and demands to Bard about settling cases. I can't
23 speak for them, but it seemed like their MO was then, and
24 maybe it is now, keep taking us to the courthouse steps before
14:51:20 25 they settle.

14:51:20 1 I don't know. I can tell you that we did a demand
2 letter and gave them cases, spent I don't know how much money
3 doing a forensic report on those cases and various ranges of
4 values depending on the device, the year of the device, the
14:51:39 5 age of the plaintiff. We spent, I don't know, probably close
6 to \$100,000 doing that. We just -- the response we got was --
7 I mean, in a short phrase, we'll see you in trial.

8 So we're interested in this. We don't think -- we
9 have a history of having settled cases with Bard. Other folks
14:52:02 10 have, too. So we're just sitting and waiting for Bard to tell
11 us they're interested in having serious discussions about
12 settlement because we've got -- we know the cases, the
13 relative value of these cases. I think the Booker case
14 helped. I think this case is going to help no matter how it
14:52:19 15 turns out.

16 So that's where we are. We've got people -- we've
17 told people if you've got a case, whether MDL or state court,
18 you've better be prepared to try it because I don't think Bard
19 is interested in settling these cases beyond one case and
14:52:37 20 trial at a time.

21 MR. NORTH: Your Honor, as can often be the case I
22 disagree with about 95 percent of Mr. Lopez's description of
23 the history of discussions and settlement activity and the
24 litigation.

14:52:52 25 But be that as it may, there will certainly come a

14:52:55 1 time when my client will be interested in sitting down. I
2 think we need more data and information right now. I don't
3 think we're at that point. I don't think it will necessarily
4 take all six bellwethers to get to that point, but I do think
14:53:11 5 we're not there yet. I think certainly we need some input
6 from this one and probably one or two more. I think by the
7 end of the year we might be in a position. And I need to talk
8 to my client further about that. But my impression is that by
9 the end of the year we might be in a position to start talking
14:53:27 10 more reasonably if we have sufficient data we believe at that
11 point.

12 THE COURT: Well, are you going to want to have
13 settlement talks before I remand?

14 MR. NORTH: I think so, Your Honor. I think it would
14:53:42 15 be in everybody's best interest before we have 3,000-plus
16 cases hitting the federal courts throughout the country.
17 Certainly would be in everybody's best interest to do that.

18 THE COURT: Okay. Well, I will tell you that I'm not
19 one of these MDL judges who will feel like I have failed if I
14:54:04 20 remand the cases. I won't.

21 My view of the purpose of the MDL is pretrial
22 procedure and discovery, and then an added benefit is
23 bellwether trials if the parties agree. And that's it. Once
24 I've done that, I've done my job. And I'm not going to feel
14:54:25 25 any hesitancy about remanding these cases when we've done that

14:54:29 1 work.

2 I say that just so you understand that I'm not going
3 to be of a mind to drag this MDL on to accommodate settlement
4 talks. We'll get the bellwethers done.

14:54:40 5 If there is a good reason to hold on to them for a
6 month or two so parties can finish settlement talks, I'll
7 certainly consider that. But I'm not going to let it linger
8 once we've gotten through the bellwether trials.

9 As I've indicated to you previously, I don't see a
14:54:59 10 need for further bellwether trials beyond the six. If six
11 doesn't give you a good enough idea of what the case is worth,
12 12 won't, in my view. Or won't give you any better idea. So
13 factor that in to your thinking about when you all want to
14 start talking.

14:55:13 15 And if at some point you think that you want me to
16 build something into the schedule of these bellwether trials
17 to accommodate that, I'll be happy to consider it. But, as
18 indicated, my present intention is to get the sixth trial done
19 by this time next year. So it will probably be a March and
14:55:33 20 May trial next year. Maybe February and April -- April
21 doesn't work very well.

22 Anyway, it will be my intent to march through and get
23 those done, unless there is a real good reason to build in
24 some sort of hiatus at some point for whatever settlement
14:55:52 25 talks need to happen.

14:55:53 1 MR. LOPEZ: Your Honor, I feel like I should mention
2 these early remand cases, too. I mean, some of those poor
3 people have been waiting five, six years. I mean, they're
4 ready to go to trial four, five months before this MDL started
14:56:08 5 and now we're almost -- we're getting close to the three-year
6 anniversary I think. The JPML hearing, I think it got
7 assigned to you some time in August, September something like
8 that, 2015.

9 THE COURT: Yeah, and I have raised the question of
14:56:24 10 remand a couple times and the parties have said not yet. So
11 I'm happy to send those cases home next week if you think it's
12 time. I actually can't remember what the last reasoning was
13 for not doing it.

14 MR. LOPEZ: I think it was all the *Daubert* things,
14:56:42 15 the things we went through to get ready for the first trial.

16 THE COURT: If there's not a reason to hang on to
17 that ten or so cases, then I'm good sending it back. That's
18 fine with me.

19 MR. LOPEZ: Can we add two pages to our six pages?

14:56:56 20 THE COURT: No. But we will add a fourth topic and
21 leave it at six pages. So topic number 4 will be --

22 MR. LOPEZ: Remanding the ten cases.

23 THE COURT: I think we called them mature cases or
24 something.

14:57:08 25 MR. LOPEZ: I think we called them mature. We called

14:57:11 1 them early remands. But the word early --

2 THE COURT: Yeah. That'll be a fourth topic for our
3 six pages.

4 MR. LOPEZ: Okay. Thank you, Your Honor.

14:57:18 5 THE COURT: All right. I think that covers
6 everything. We'll get an order out on these issues and we'll
7 let you know as soon as we hear something from the jury.

8 MR. NORTH: Thank you, Your Honor.

9 MR. LOPEZ: Thank you, Your Honor.

14:57:27 10 Your Honor, did you say how long the jury's going to
11 deliberate today?

12 THE COURT: Have they indicated?

13 We leave it to them to decide how long they want to
14 go.

14:57:37 15 (The Court and the courtroom deputy confer.)

16 THE COURT: We've told them they can go as long as
17 they want. They haven't told us yet how long they want to go.

18 My practice is not to call them back in at the end of
19 the day when they're done, just to let them leave. But if we
14:57:52 20 get word they've left, we'll let you know so we don't keep you
21 hanging around.

22 MR. LOPEZ: Thank you.

23 (End of transcript.)

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C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 7th day of June, 2018.

s/ Patricia Lyons, RMR, CRR
Official Court Reporter